

**Matter of:** West State, Inc.  
**File:** B-255692; B-255693  
**Date:** March 23, 1994

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John T. Jozwick, Esq., Schiffrin, Hopkins & Olson, for the protester.  
Ed Zajonc for Cascade General, Inc., and Lee E. Wilson, Esq., for Service Engineering Company, interested parties.  
W. Michael Rose, Esq., for the Maritime Administration, and David R. Kohler, Esq., and Audrey H. Liebross, Esq., for the Small Business Administration.  
C. Douglas McArthur, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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#### **DIGEST**

1. Where record shows that new information relied upon by protester to challenge determination of nonresponsibility was not available until after Small Business Administration (SBA) declined to issue certificate of competency (COC), protest allegation that SBA failed to consider vital information is denied; there is no legal requirement that the SBA reconsider its determination or that the contracting officer ask the SBA to reconsider.
2. Protest that the contracting officer improperly failed to reconsider nonresponsibility determination in light of new information submitted before award, but after Small Business Administration declined to issue a certificate of competency, is denied where record indicates that contracting officer did consider the evidence presented and reasonably determined that reversal of the nonresponsibility determination was not warranted.

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#### **DECISION**

West State, Inc. (WSI) protests the rejection of its bids under invitation for bids (IFB) Nos. DTMA94-93-B-00012 (-00012) and DTMA94-93-B-00004 (-00004), for repair, activation, and deactivation of two ready reserve fleet vessels, the SS Cape Girardeau and the SS Cape Orlando. WSI contends that the agency and the Small Business Administration (SBA) failed to consider all information bearing on its financial responsibility.

We deny the protest.

On August 20, 1993, the U.S. Department of Transportation, Maritime Administration, issued IFB -00012, for award of a fixed-price contract for general support including repair, activation, and deactivation of the Cape Girardeau to the lowest responsive and responsible bidder. On August 27, the Maritime Administration issued IFB -00004 for award of a fixed-price contract for general support and repair to upgrade the Cape Orlando, recently added to the ready reserve fleet.

The agency received four bids in response to -00012 on September 22, and three bids in response to -00004 on September 27. WSI submitted the low bid in response to both solicitations--\$6,069,945 for the Cape Orlando (-00004) and \$1,801,261 for the Cape Girardeau (-00012). As a result, the contracting officer requested a preaward financial review of WSI from the regional finance officer, to include current audited financial statements and a Dun & Bradstreet report.

The regional finance officer reviewed the information available and concluded that WSI was not financially responsible for award of the contracts. The finance officer noted that WSI currently had a negative net worth (in excess of \$6 million), negative working capital (\$8.4 million), and 1992 interest expense (\$1.1 million) nearly doubled its long-term debt of \$577,143.00, indicative of a high rate of interest due to the factoring of its accounts receivable. In addition, the finance officer noted that WSI's current liabilities of \$17 million were nearly double the value of its current assets and that several subcontractors had contacted the agency to complain of late payments; this was consistent with the Dun & Bradstreet report, which indicated that WSI was slow to pay its creditors. Further, comments attached to WSI's financial statement by its accountant warned that WSI's heavy debts "raise substantial doubt about the Company's ability to continue as a going concern."

The contracting officer determined that WSI was financially nonresponsible for performance of the contracts, and forwarded her determination to the SBA for consideration of a certificate of competency (COC). The SBA notified the agency and WSI that it would not issue a COC because of evidence "that WSI, Inc. has been deteriorating financially for several years. There is no solid indication that WSI can continue to survive for the period of the contract."

On November 1, WSI asked the SBA to reconsider its decision because of new financial data; specifically, WSI stated it had received payment of \$1.5 million as settlement of a

lawsuit that had been pending for 2 years. Further, WSI asked the SBA to consider the effect of a \$5 million loan from Capital Consultants, Inc., one of WSI's chief creditors, which WSI expected to receive within a week. SBA personnel met with WSI officials to explain SBA's decision but declined to reconsider the decision unless requested to do so by the agency. WSI then contacted the agency, which agreed to review the new information.

On November 5, WSI met with the contracting officer and provided her with a copy of a November 3 letter from Capital Consultants concerning the settlement and refinancing arrangements to be completed by November 12. The letter indicated that the settlement receipts had been used to satisfy a loan from Capital Consultants but that Capital Consultants would make an additional \$2 million in credit available to WSI.

After reviewing the new information, the contracting officer concluded that none of her concerns about WSI's financial capacity had been resolved. The contracting officer noted that the cash settlement was already gone, and that WSI's new financing essentially involved restructuring its loans with Capital Consultants. Also, WSI still had a negative net worth, and the additional financing would mean an increased debt to service. Further, WSI offered no plan to pay subcontractors on prior Maritime Administration contracts, apart from the filing of claims on those contracts,<sup>1</sup> and many potential subcontractors were demanding advance payment prior to performing work for WSI. Accordingly, she declined to reverse her determination of nonresponsibility and this protest followed.

Under 15 U.S.C. § 637(b)(7) (1988), the SBA has conclusive authority to determine a small business bidder's responsibility by issuing or refusing to issue a COC; its determination must be accepted by the agency as "conclusive." See Tomko, Inc., 63 Comp. Gen. 218 (1984), 84-1 CPD ¶ 202. SBA's internal procedures do not provide for review of new information submitted after the denial of a COC. Rather, SBA advises firms to furnish such information to the contracting officer, who may resubmit the case to SBA. Our Office has no authority to compel SBA to review its denial of a COC, apart from those instances where our review of such a denial indicates that SBA's

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<sup>1</sup>WSI filed claims in September and October of 1993, for over \$3 million. The SBA report also indicated that WSI was facing several major lawsuits, one of which was for more than \$4 million from the state accident insurance fund. Others involved unpaid invoices and claims from unpaid workers.

action on a referral may have been taken fraudulently or in bad faith, or that SBA failed to consider vital information bearing on the protester's responsibility. 51 Comp. Gen. 448 (1972); Spheres Co., B-225755, June 5, 1987, 87-1 CPD ¶ 573. Here, the record shows that SBA considered all information relevant to WSI's responsibility at the time that it was considering WSI's COC application. SBA was aware of the pending settlement, but WSI offered none of the information upon which it relies to challenge the nonresponsibility determination prior to the time that SBA issued its decision.

Where new information probative of a small business concern's responsibility comes to light for the first time prior to contract award, the contracting officer may reconsider a nonresponsibility determination even though SBA already may have declined to issue a COC. Reuben Garment Int'l Co., Inc., B-198923, Sept. 11, 1980, 80-2 CPD ¶ 191. There is no requirement that the contracting officer request SBA reconsideration of a nonresponsibility determination, and where, as here, she does decide to reconsider her own determination, our review is limited to determining whether the reassessment was reasonable. Marlow Servs., Inc., 68 Comp. Gen. 390 (1989), 89-1 CPD ¶ 388. We find that the contracting officer's determination not to change her determination on the basis of WSI's new information was reasonable.

Federal Acquisition Regulation (FAR) § 9.104-1(a) provides that before award of a contract the contracting officer must make an affirmative determination of the prospective contractor's responsibility, including whether the contractor has adequate financial resources to perform the contract or the ability to obtain them. None of the information provided to the contracting officer addressed her concerns over WSI's negative net worth, heavy debt load, failure to pay its subcontractors, or ability to continue as a going concern. Several subcontractors are now demanding that WSI pay cash on delivery, and WSI makes no attempt to defend its record of nonpayment, beyond the statement that some vendors will always be disgruntled when they are not paid. Nor does WSI address its substantial liability for more than \$2.5 million in workers' compensation claims, other than to state that it is not troubled by the debt and blames the insurer for mismanagement of claims. In general, WSI contends that the agency and our Office should ignore the complaints of its creditors.

The record before the contracting officer indicated that much of the protester's debt resulted from the factoring of its accounts receivable, much of it financed by Capital Consultants. Subsequent to WSI's receipt of the litigation settlement, Capital Consultants apparently agreed to a

restructuring of WSI's debt; nevertheless, the contracting officer was not convinced, in view of the continuing demand for cash payment by WSI's subcontractors, that WSI possessed sufficient financial resources to perform satisfactorily and in a timely manner. In addition, since the filing of this protest, the agency has issued a cure notice under WSI's most recently awarded contract because WSI has been unable to provide acceptable evidence of insurance necessary for the issuance of a notice to proceed. While the protester disagrees with the contracting officer's determination, there is nothing in the record before us to indicate that her conclusions were unreasonable.

The protest is denied.

Robert P. Murphy  
Acting General Counsel